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No. 91-1763

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OTTAWAY NEWSPAPERS, INC., d/b/a ASHLAND PUBLISHING COMPANY, and P. R. BAILEY,

Petitioners,

vs.

DAVID OSBORNE, KENCO AND ASSOCIATES, INC. and ROGER W. HALL,

Respondents.

Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the Kentucky Court of Appeals correctly applied the standards of *New York Times Co. v. Sullivan* and its progeny to the claims of a private attorney engaged to provide legal assistance to a local water district and the local water district's consulting engineer in determining they were public officials and public figures respectively and further determining that attendance at public meetings of the water district did not equate to effective "means of communication" necessary to overcome or rebut charges of defamation against them published by the local paper.

B. Whether a claim for defamation against the local newspaper lodged by a private attorney working under contract for a local water district and the water district's private consulting engineer resulted in a civil action for seditious libel.

C. Whether the Kentucky Court of Appeals conducted the required review of the record when it failed to adopt the contentions of the Petitioners that attendance at public meetings of a local water district equated to significantly greater access to the channels of effective communication required by *Gertz v. Robert Welch, Inc.*

RULE 29.1 STATEMENT

The Respondents are not subsidiaries or affiliates of a publicly-owned corporation nor does a publicly owned corporation not a party to this action have any financial interest in the outcome.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In April of 1985, Ashland Kentucky's *Daily Independent* (the newspaper published by Petitioner Ottaway Newspapers, Inc.) published a series of articles concerning the formation, operation and administration of the Big Sandy Water District in rural Boyd County, Kentucky. The general tenor of the series was the District was an engineering and financial fiasco and the series further imputed unethical or criminal conduct to Respondents,

Roger Hall and David Osborne and Osborne's business, Kenco and Associates.

The defamatory series was authored by Petitioner, P. R. Bailey, a novice reporter, hired by the *Daily Independent*. Bailey had no experience or formal training in journalism and based the series heavily on interviews with a disgruntled former employee of the water district and a citizen who had been bypassed for service.

The trial court entered summary judgment in the case on April 4, 1988 finding private Attorney Roger Hall to be a public official as a result of his contract to do legal work for the Big Sandy Water District and found Respondents, Engineer David Osborne and Kenco and Associates, to be limited purpose public figures. The Trial Court primarily based its decision on the fact that Hall, Osborne, and Kenco had sufficient access to the press through the medium of public meetings of the Big Sandy Water District to successfully rebut the defamation charges lodged against them on the pages of the *Daily Independent*, the newspaper published by the Petitioners.

Kentucky's Court of Appeals entered its decision on June 21, 1991, reversing and remanding for further proceedings the summary judgment entered by the Boyd Circuit Court. The Kentucky Court of Appeals found that Respondent and private attorney, Roger Hall was not a public official and that Respondents David Osborne and Kenco and Associates were not limited purpose public figures. The Court also refused to equate attendance at public meetings of the Water District to the effective channels of communication necessary to rebut the defamatory allegations raised in the articles published by the

Daily Independent and furthermore, found evidence of malice which the Court felt should be submitted to the jury.

The *Daily Independent's* petition for rehearing from the Kentucky Court of Appeals was denied on September 20, 1991 and the Kentucky Supreme Court denied discretionary review on February 5, 1992. The Petition for Writ of Certiorari to the United States Supreme Court followed.

THE DEFAMATION OF ROGER HALL

Attorney Roger Hall was an attorney in private practice in Boyd County, Kentucky whose firm was hired as counsel for the Big Sandy Water District the year after its formation. His duties were primarily the drafting of deeds and the handling of condemnation suits for right-of-way easements for the Water District. As part of his job, he was required to attend the public meetings of the Big Sandy Water District.

Hall had previously been the scrivener for the Articles of Incorporation for Sandy Valley Development, Inc. which had been formed by the director of the Fivco Development District and his wife to develop Mockingbird Estates in southern Boyd County, an area which was subsequently served by the Big Sandy Water District. Attorney Hall neither promoted Sandy Valley's development of the subdivision, nor owned any portion of Mockingbird Estates, except a single lot he purchased in return for legal services.

As part of its series, the *Daily Independent* published that Hall was a partner in Sandy Valley Development,

that he owned an interest in the corporation, and that he was promoting the subdivision's development. The articles imply that Hall used his client, Big Sandy Water District, to enhance the value of Sandy Valley Development's holdings for his own financial gain.

In an attempt to show that the Water District could have saved money by using the county attorney for its counsel rather than hiring outside counsel, the *Daily Independent* exaggerated Attorney Hall's hourly rate, and printed the fictitious figure of $13,000.00, supposedly representing Hall's billings for 1982 and 1983. The actual billings for the two years totaled $7,882.74. The *Daily Independent's* reporter, P. R. Bailey, admitted that the $13,000.00 figure was a complete fabrication and that he had used it to make their case against hiring outside counsel. The *Daily Independent* did not verify the figures it published for Hall's hourly rate or the total billings by either asking Hall, or by consulting the actual billings which were filed in the Water District's office.

THE DEFAMATION OF DAVID OSBORNE AND KENCO AND ASSOCIATES

The *Daily Independent* published an article caption alleging that the Big Sandy Water District was a "playground for engineers" and made allegations that the District's water lines were laid outside the District boundaries illegally, ignoring the provisions of Kentucky's statutes concerning water district lines and boundaries.

The *Daily Independent* further made allegations that in an effort to service the Mockingbird Estates owned by

Sandy Valley Development, and in which Kenco owned one lot, the District laid its water lines without casings directly in the path of the expansion of U.S. Rt. 23, thus requiring relocation of the line. The *Daily Independent* ignored the fact that the minutes of the Water District clearly showed the lines were laid without casings because the Commonwealth of Kentucky, at the time the pipelines were laid, did not have the exact route of new U.S. 23 laid down and had told the District that the lines would be moved at State expense when the actual route was determined.

The paper selectively quoted from an Inspector General's report critical of the Water District, but neglected to check the public record in response to the report. Subsequent correspondence clearly showed that the concerns of the Inspector General had been addressed, and in fact, Kenco and Associates had not been overpaid as alleged by the report and reported by the *Daily Independent*, but actually was due an additional $2,037.77.

The *Daily Independent* further published that the Public Service Commission had "uncovered evidence of conscious wrong doing on the part of Kenco and Associates", but the article failed to explain the references to this alleged illegal activity and "conscious wrong doing".

THE KENTUCKY COURT OF APPEALS' DECISION

The Kentucky Court of Appeals used as benchmarks for its decision, the U. S. Supreme Court cases of *Rosenblatt v. Baer*, 383 U.S. 75 (1966), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *New York Times Co. v. Sullivan*, 376

U.S. 254 (1964) in arriving at its determination that private attorney Roger Hall had not become a public official and that engineer David Osborne and Kenco and Associates had not become limited purpose public figures. The Kentucky Court further refused to equate attendance at the public meetings of a local water district to the means of "effective communication" necessary to rebut the defamatory articles published by the *Daily Independent*. The Kentucky Court of Appeals also found evidence of malice and referred the case back to the trial court for proceedings consistent with their decision. It is from that action and the denial by the Kentucky Court of Appeals of the *Daily Independent's* petition for rehearing and further, the denial by the Kentucky Supreme Court to hear the case that this appeal to the United States Supreme Court follows.

THE UNITED STATES SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

SECTION I

THE KENTUCKY COURT OF APPEALS CORRECTLY APPLIED THE STANDARDS OF *NEW YORK TIMES CO. V. SULLIVAN* AND ITS PROGENY

A.

HALL WAS NOT A PUBLIC FIGURE OR PUBLIC OFFICIAL

The Decision of the Kentucky Court of Appeals from which the *Daily Independent* appeals rests foursquare on the foundation of the previous opinions of this Court. The guidance found in *New York Times Co. v. Sullivan*, 376 U.S.

254 (1964) and its progeny such as *Rosenblatt v. Baer*, 383 U.S. 75 (1966), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) formed the framework for the Kentucky Court's analysis and its decision in this case. Petitioners' reliance on state law from sister states where the facts were materially different to somehow modify the clear guidance set forth by the U.S. Supreme Court on this fundamental federal question is misplaced.

The Kentucky Court of Appeals, in its analysis of the case, reiterated and then correctly applied the standard set forth in *Rosenblatt v. Baer, supra*, at 85:

> [T]he "public official" designation applies at the very least to those among the hierarchy of government employees, who have, or appear to the public to have, **substantial responsibility for or control over** that conduct of governmental affairs . . . where a position in government has such apparent importance that the public has an *independent interest* in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times'* malice standard applies. [Emphasis added by Kentucky Court of Appeals] App. at 4A.

The Kentucky Court of Appeals also reiterated the guidance provided by this Court in *Gertz v. Robert Welch, Inc., supra* at 344, regarding the fact that public officials "usually enjoy significantly greater access to the channels

of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."

Applying the above standards to Attorney Roger Hall, the Kentucky Court said:

> In applying these standards to the Appellant, Hall, it is our conclusion the trial court erred as a matter of law in determining Hall to be a public official. Hall is not a government employee, but an attorney in a private law firm who has contracted to do legal work for Big Sandy for an hourly fee. Hall is not employed by Big Sandy Water District on a full time basis. . . . More importantly there was no evidence that Hall has any "substantial responsibility" for or control over Big Sandy. There is also no evidence that Hall enjoys "significantly greater access" to the media. App. at 5A.

In a footnote, Kentucky's Court of Appeals further noted:

> Hall described his duties as attending monthly meetings of the commissioners of the Water District, rendering advice, if asked, and handling any litigation involving the District. The only court appearances required concerned condemnation. His "main function" was to prepare easements and deeds from tracts of land where pumping stations are located. App. at 5A.

It is clear that Kentucky's Court of Appeals followed, in fact almost word for word, the guideline of *Rosenblatt v. Baer, supra,* and *Gertz v. Robert Welch, Inc., supra. **There was no deviation from the standard.*** The footnote quoted above clearly shows that the court conscientiously considered the duties Roger Hall performed for the Water

District. The court found that the scope of Hall's duties did not result in "substantial responsibility for" *or* "control over" the Big Sandy Water District. In reaching this decision, the Kentucky court also considered that Attorney Hall was an attorney in private practice and not an "employee" of the Water District. He was employed *by* the District under a contract on an hourly basis to perform legal services for them. He was in fact an independent contractor and not an employee.

The reliance by the *Daily Independent* on cases from jurisdictions foreign to Kentucky is misplaced, as was noted by the Kentucky Court of Appeals. The *Daily Independent* relied heavily on *Tunnell v. Edwardsville Intelligencer, Inc.*, 90 Ill. App.2d 1, 241 N.E.2d 28 (Ill. App. Ct. 1968) in its arguments to the Kentucky Court of Appeals for its contention that Attorney Hall was a public figure. That case shows clearly the differences between the cases cited by the *Daily Independent* and this case. In *Tunnell, supra*, the attorney in question was the *full time city attorney* and the scope of his duties was such that:

> He is the law officer of the City, not a mere servant of the City counsel; rather he is the legal adviser of the counsel and of all City officers, under a duty to advise the City officers with respect to their powers and duties, and he represents the City in all legal matters. "While he is bound to obey the directions of the City counsel concerning litigation with respect to matters wholly within control of the counsel, on matters which merely concern the public, which are for the preservation of morals and maintenance of good order, the abatement of public nuisances, and the destruction of dens of lies and infamy,

> he is wholly independent of the city counsel and as a servant of the People, and as to such matters is vested with powers and burdened with duties over which the counsel has no jurisdiction." *Tunnell, supra* at 36.

Here, unlike *Tunnell,* it is clear that Attorney Roger Hall's duties for the Water District consisted primarily of preparing deeds and litigating condemnation actions for right-of-ways. It is therefore not surprising that the Kentucky Court of Appeals found that Hall's duties did not rise to the level of "substantial responsibility for" or "control over" the Big Sandy Water District as envisioned by *Rosenblatt v. Baer, supra.*

B.

OSBORNE AND KENCO AND ASSOCIATES WERE NOT LIMITED PURPOSE PUBLIC FIGURES

The Kentucky Court of Appeals likewise found that Osborne and Kenco and Associates were not limited purpose public figures:

> . . . the record does not indicate that the engineers utilized the media to effect any particular result. That Kenco and Osborne have been mentioned in articles over the years does not, as appellees suggest, constitute the type of "intense media attention" necessary for one to have assumed the risk of defamation. App. at 6A.

These holdings are consonant with the prior rulings of this Court in such cases as *Gertz v. Robert Welch, Inc., supra,* and *Hutchinson v. Proxmire,* 443 U.S. 111 (1979).

The *Daily Independent* makes much ado about the fact that the Kentucky Court of Appeals rejected the contention that attendance at public meetings of the Water District equated to the "significantly greater access to the channels of *effective communication*", which provide "a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz v. Robert Welch, Inc., supra* at 344. For the Kentucky Court of Appeals to have held differently would have transformed *anyone* who attended public meetings in the Ashland area into a limited purpose public figure, whether or not that person ever participated in the meetings. Taking the argument to the next logical step would result in one becoming a limited purpose public figure because one *could have* availed themselves of these "channels of effective communication" had that person so desired to attend one of the public meetings. Clearly the Kentucky Court was loathe to go down the "slippery slope of logic" which would equate attendance at a public meeting of a local water district to the *effective channels* of communication necessary to rebut the widespread circulation of the Petitioner's *Daily Independent*.

Kentucky's own Supreme Court had indicated quite succinctly the fallacy of Petitioners' argument in the recent decision of *Warford v. Lexington Herald Leader Co.*, 789 S.W.2d 758 (Ky. 1990). Relying on *Hutchinson v. Proxmire, supra*, the *Warford* Court said:

> The fact that the appellant received occasional press attention, or that one can reasonably speculate that if local media decided to publish an article on [a particular controversy], a reporter might ask appellant for his views does not

imply that he could just as easily have insisted his views be published. 789 S.W. 2d at 771.

The Kentucky Court of Appeals properly applied the guidance given by this Court in *New York Times Co. v. Sullivan, supra,* and its progeny in arriving at their decision that Hall was not a public official and that Osborne and Kenco and Associates were not limited purpose public figures. The issues raised in the petition of the *Daily Independent* were appropriately addressed by Kentucky's Court of Appeals, which returned the case to the trial court for further proceedings on the merits.

SECTION II

CLAIMS FOR DEFAMATION AGAINST A LOCAL NEWSPAPER LODGED BY A PRIVATE ATTORNEY WORKING UNDER CONTRACT FOR A LOCAL WATER DISTRICT AND THE WATER DISTRICT'S PRIVATE CONSULTING ENGINEER ARE NOT SEDITIOUS LIBEL.

The claim for alleged seditious libel has been raised for the *first* time in the *Daily Independent's* petition to this Court. It should be dismissed as improperly preserved. *Springfield v. Kibbe,* 480 U.S. 257, Reh den 481 U.S. 1033 (1987) citing *California v. Taylor,* 353 U.S. 553 (1957).

This case has nothing to do with "truthful criticism of government" as alleged by the *Daily Independent* when it contends that the holding of the Kentucky Court of Appeals resulted in a cause of action for seditious libel. This entire case revolves around the defamatory statements printed about a private attorney who was hired to perform work for the Big Sandy Water District and a private engineering firm and its owner who were hired as

the consulting engineers for the water district. It has nothing whatsoever to do with any claim *by* the Big Sandy Water District against the *Daily Independent*.

The case relied on by the *Daily Independent* when it suggests that the decision of the Kentucky Court creates a cause of action for seditious libel is the case of *Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (Ill. 1923). That case concerns a 1920's action by the now infamous Tammany government of the City of Chicago against a local newspaper. The City sued the newspaper because it printed a story saying that the City of Chicago was bankrupt. Here, however, the cause of action was brought by two private individuals and a private consulting firm who were intentionally or recklessly defamed by the *Daily Independent*. This case has nothing to do with any action by the Big Sandy Water District. It is merely a case of yellow journalism against private individuals and a private consulting firm.

Nor has the *Daily Independent* been found liable for publishing the "truth". Kentucky's Court of Appeals very succinctly addressed the issue of "substantial truth" raised by the *Daily Independent*. The Court said, as an example, that although misrepresenting that Attorney Hall charged $65.00 an hour for his services when he only charged $60.00, this error was susceptible to the "substantial truth" test. But, in its decision, the Kentucky Court went on to state:

> "However, the articles, considered *in their entirety*, contained more than just slight factual inaccuracies; they impute criminal activity and ethical misconduct to the Appellants. There is, we hold, sufficient evidence of the falsity of the

> statements to allow the jury to decide the issue of whether the statements are true." (Emphasis supplied) App. at 7A.

Illustrative of the "more than just slight factual inaccuracies" is the publication of the figure of $13,000.00 which supposedly was the amount of Attorney Hall's fees incurred by the Water District in 1982 and 1983. The novice investigative reporter for the series for the *Daily Independent* testified that this was a completely fictitious figure which he utilized to show the Water District could have saved money using the local county attorney instead of Hall. Hall's billings for the two years were $7,822.74 – surely intentionally publishing a fictitious figure which is a $5,177.26 error for attorney fees (not quite double what they actually were) is not *substantial* truth and it never has been. It should come as no surprise that the Kentucky Court of Appeals found evidence of malice.

SECTION III

THE KENTUCKY COURT CLEARLY CONDUCTED THE REQUIRED REVIEW OF THE RECORD

There is no probative evidence that the Kentucky Court of Appeals did not conduct a *de novo* review. The *Daily Independent* bases its contention that a *de novo* review was not conducted simply because "it is blatantly obvious that the Kentucky Court of Appeals ignored the trial court record". The Kentucky Court of Appeals refused to accept the *Daily Independent's* contention that attendance at public meetings of a "Mickey Mouse" [Petitioner's own characterization] water district equated to "significantly greater access to the channels of effective communication" as required by *Gertz v. Robert Welch, Inc.*,

supra. The *Daily Independent* premises its entire argument that water district meetings were "effective communication" on the fact that the *Daily Independent* normally sent a reporter to these meetings.

This Court has long held that the newspaper cannot create its own "controversy" and then rely on that controversy to create limited purpose public figures out of the object of its alleged "investigative" reporting. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979).

The *Daily Independent* bases its argument that it was "blatantly obvious" that Kentucky's Court of Appeals did not conduct a *de novo* review in this case on the fact that "Hall admitted that he expected media coverage" and Osborne admitted he was "experienced in dealing with the media". Representing clients whose activities may be of some interest to the local newspaper, such as the Big Sandy Water District, does not divest an attorney of the attorney's protections under the Constitution accorded a private person and expose the attorney as a limited purpose public figure. *Gertz v. Robert Welch, Inc., supra*. Nor does an attorney become a "public official" when doing legal work under contract with a quasi-governmental agency in conjunction with a private legal practice.

If the contention of the *Daily Independent* was the law, every person in the Ashland area has "access to effective channels of communication" to rebut defamatory statements printed by the *Daily Independent* when it creates a "controversy", *if* they only attended public meetings where a newspaper reporter was present. Would a citizen who attends public meetings, but has *never* said a word

be considered a limited purpose public figure under the *New York Times* standard? Would they become a limited purpose figure if the person spoke up once? The *Daily Independent's* sole contention is that attendance at public meetings equates to "significantly greater access" to the media that is functionally equivalent to the circulation of their newspaper and sufficient to rebut the allegations of the newspaper defaming a person's reputation. The *Daily Independent* would have this Court hold that attendees at public meetings become limited purpose public figures. Such clearly is *not* consonant with the prior holdings of this Court.

The *Daily Independent* further contends that *because* the Kentucky Court of Appeals *failed to hold* that the "greater access to the media" acquired by attendance at public meetings of the Big Sandy Water District is equivalent to the circulation of Ashland's *Daily Independent*, a *de novo* review was "obviously" not conducted. This contention should be given the short shrift it deserves as an argument before this Court.

CONCLUSION

The Petitioners premise their appeal to the United States Supreme Court on four basic factors. First, that the Kentucky Court of Appeals erred in failing to rely on dissimilar cases from other jurisdictions, when it held to the underlying tenets of the decisions of this Court in determining that Respondents Attorney Roger Hall, Engineer David Osborne and Kenco and Associates were private individuals and not public officials or limited

purpose public figures. Second, that the Kentucky Court of Appeals erred when it rejected the argument of the Petitioners that the attendance by Hall and Osborne at the public meetings of the Big Sandy Water District equated to the wide circulation of Petitioners *Daily Independent* so as to provide an effective means of communication to combat the defamation against them. Third, that somehow the action by Hall, Osborne and Kenco was transformed from one of a cause of action by individuals for their personal defamation into one of strict liability for seditious libel, an issue raised for the first time before this Court. Fourth, that the Kentucky Court of Appeals, by failing to hold as the Petitioners wished, "obviously" shirked its duty for *de novo* review of this case.

Clearly, on all four of the foregoing points, the Petitioners have ignored the clear holding of the Kentucky Court of Appeals in their application of the standards set by *this* Court in determining who is a public official, who is a limited public purpose figure and what is considered to be access to the "channels of effective communication" necessary to rebut defamation. For all of the foregoing reasons, Respondents, Attorney Roger Hall, Engineer

David Osborne and Kenco and Associates pray that this Court deny the petition of the *Daily Independent*.

DATED: May 27, 1992.

Respectfully submitted,

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